Supreme Court, U.S.
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No. 95-1603

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

RICHARD YONTZ,
Petitioner,

v.

AMY D. ADAMS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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81 pp

QUESTION PRESENTED

Whether, in this action brought under 42 U.S.C. § 1983, the Sixth Circuit was correct in concluding, based on decisions of its own that were rendered before or during the relevant time frame and based on the facts as assumed by the district court, that the legal norms petitioner and his subordinate are alleged to have violated were clearly established at the time of the challenged actions and that, therefore, petitioner is not entitled to qualified immunity.

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STATEMENT OF THE CASE

Petitioner/defendant Richard Yontz (hereinafter "Yontz") has filed a Petition for a Writ of Certiorari following his unsuccessful interlocutory appeal to the Sixth Circuit pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985). Yontz purported to appeal from two orders issued by United States District Judge Walter Rice of the Southern District of Ohio. These orders, attached hereto as Appendices B and C,[1] disposed of the only two qualified immunity arguments that Yontz raised before the district court. Yontz raised a third qualified immunity argument for the first time before the Sixth Circuit, which the court of appeals rejected in its decision. Appendix A.

Plaintiffs are eleven deaf or hearing-impaired children, suing under 42 U.S.C. § 1983 through their parents. The children were third, fourth, and fifth graders when they were physically and emotionally abused by Yontz's co-defendant, Beverly Kaech, plaintiffs' instructor at Highlands Elementary School (HES) in Springfield, Ohio.[2] HES is located in the Springfield City School District (SCSD). Yontz served as principal of HES from 1982 to 1991, during which most of the alleged abuse occurred.

On April 10, 1992, plaintiffs filed their complaint

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[1] Due to Yontz's inaccurate reproduction of the decision of the Sixth Circuit and of the two orders issued by the district court, plaintiffs have reproduced these opinions as Appendices A, B, and C for the convenience of the Court.

[2] Kaech did not take part in Yontz's appeal and has not filed any papers with respect to the instant petition.

naming Kaech, SCSD, and Yontz as defendants. In their § 1983 claim against Yontz, plaintiffs asserted that Yontz was under a duty to protect them from Kaech because plaintiffs enjoyed a "special custodial relationship" with Yontz. Plaintiffs further alleged that Yontz's indifference to their allegations against Kaech resulted in violation of their rights under the due process clause.

On May 3, 1993, SCSD and Yontz moved for summary judgment based, in part, on qualified immunity. Viewed in the light most favorable to plaintiffs, the record in connection with defendants' motion documented plaintiffs' allegations of years of Kaech abusing and injuring the children, including slapping them across the face; slamming their faces into their desks; throwing books at them; angrily shoving a hearing aid into one child's ear, causing the ear to bleed and ordering the bleeding child to the principal's office; scratching children almost routinely; intentionally tripping a student; jabbing a student with a pencil; inflicting other injuries on children, such as bruises, a bloody lip, and a serious knee injury; yelling and hurling demeaning insults at the children, often in regard to their disabilities; in short, routinely engaging in the sort of physical and mental abuse that, in the opinion of plaintiffs' expert, is likely to have long-lasting adverse impact. *See* Appendices B and C. Kaech denied these allegations. Plaintiffs also maintained that they submitted several oral and written complaints about Kaech's conduct to Yontz, but that Yontz invested little time and effort in responding to these complaints and, in the end, always believed Kaech's denials. For his part, Yontz insisted he never saw Kaech abuse plaintiffs, that he only received three complaints about Kaech, and that he adequately investigated the complaints.

raised in his motion for summary judgment. Yontz argued that, under *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), he had no duty to protect plaintiffs from Kaech. The district court found *in favor of Yontz* on that issue in the order attached as Appendix B.[3] Nevertheless, the district court denied, in part, Yontz's motion for summary judgment. In partially denying summary judgment, the district court observed that, while Yontz had no affirmative duty to protect plaintiffs, Yontz could still be held liable for Kaech's conduct because he served as Kaech's supervisor. App. 29a-30a. For this reason, the district court held that it would be improper to grant Yontz full qualified immunity. *Id.*

This observation by the district court highlighted Yontz's failure to raise in a timely fashion what would later become his second qualified immunity argument – i.e., that Kaech's conduct did not violate plaintiffs' "clearly established" constitutional rights. Yontz did not raise this argument as a basis for qualified immunity until after the district court had partially denied his motion for summary judgment.

In the intervening time, on July 14, 1995, Yontz filed his Notice of Appeal. Yontz first raised the issue whether or not Kaech's conduct violated plaintiffs' clearly established rights when he asked the district court for a stay pending his interlocutory appeal from the denial of summary judgment. The district court resolved this issue *against Yontz* in an opinion dated July 25, 1994, which is

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[3] The *DeShaney* issue was therefore not addressed by the Sixth Circuit.

attached as Appendix C. App. 46a-60a.[4]

Yontz raised yet a third theory of qualified immunity for the first time before the Sixth Circuit: he claimed qualified immunity from plaintiffs' supervisory liability claim. *See* App. 58a n. 9 (where the district court indicated that Yontz had never raised this issue).[5]

On January 5, 1996, the Sixth Circuit issued an unpublished decision rejecting all of Yontz's qualified immunity arguments. Appendix A.

REASONS WHY THE PETITION SHOULD BE DENIED

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, review on a petition for a writ

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[4] In this opinion, the district court expressed the opinion that the issue should have been raised in a proper Rule 56 context. App. 49a. In the same opinion, the district court certified Yontz's interlocutory appeal as frivolous. App. 59a. The Sixth Circuit reversed this finding. This issue is not before the Court for proposed review.

[5] While Yontz attacked the merits of plaintiffs' supervisory liability claim in his motion for summary judgment, asking the district court to find there was no genuine issue of material fact as to supervisory liability, he did not actually claim qualified immunity from that cause of action until reaching the Sixth Circuit. App. 58a. The fact that the Sixth Circuit was asked to address an issue that Yontz had not raised before the district court *as a ground for qualified immunity* frustrates the entire premise for qualified immunity appeals under *Mitchell v. Forsyth*, as recently reiterated by this Court in *Johnson v. Jones*, 115 S.Ct. 2151 (1995). In *Johnson*, this Court indicated that *Mitchell* appeals should be limited to those that present neat, conclusively determined abstract issues of law. *Id.* at 2155, 2158, citing in part *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). A qualified immunity argument that was never presented to the district court cannot be considered either neat or conclusively determined.

of certiorari is not a matter of right, but of judicial discretion. No special or important reasons exist in this case warranting the granting of Yontz's Petition. Yontz has not asserted that United States Courts of Appeals are in conflict with one another on the issues proposed for review. Rule 10(a). To the contrary, the qualified immunity issues presented for review are, by their nature, so peculiarly and exclusively dependent upon Sixth Circuit precedents and, to a lesser extent, Southern District of Ohio precedents that review by this Court would not affect any other Circuit. Moreover, the Sixth Circuit did not render a decision that conflicted with applicable decisions of this Court. *Id.* The Sixth Circuit's decision involved straight-forward application of, first and foremost, that court's own precedents related to (1) a student's right to bodily security in school, and (2) a supervisor's liability under § 1983 for the unconstitutional acts of his subordinates. In short, Yontz's Petition is predicated on his belief that the Sixth Circuit has misapplied its own case law. As demonstrated below, Yontz's belief is definitely not well-founded. In any event, the objective of Yontz's Petition is far too narrow and the potential salutary effects of review far too limited for this Court to grant the Petition. Rule 10. Yontz's Petition for a Writ of Certiorari should be denied.

I.

THE SIXTH CIRCUIT PROPERLY SUSTAINED THE DISTRICT COURT'S CONCLUSION THAT KAECH'S CONDUCT VIOLATED PLAINTIFFS' CONSTITUTIONAL RIGHTS UNDER "CLEARLY ESTABLISHED LAW," AS VIEWED DURING YONTZ'S TENURE AS PRINCIPAL.

Yontz first poses the threshold question whether or not the Sixth Circuit was correct in holding that Kaech's conduct violated plaintiffs' constitutional rights under "clearly established law," as viewed during Yontz's tenure as principal, i.e., at any time between 1982 and 1991. Petition, pp. 11-18; *see* App. 5a-6a. Plaintiffs submit the Sixth Circuit was correct on this point: during the relevant period, a principal in Yontz's position could not objectively have harbored a reasonable belief that Kaech's conduct was constitutionally permissible.[6]

In 1980, two years before Yontz became principal

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[6] As early as 1974, eight years before Yontz became principal at HES, a Southern District of Ohio decision involving the very same Springfield City School District, *Sims v. Waln*, 388 F.Supp. 543, 549 (S.D. Ohio 1974), stated that corporal punishment had been held to violate the Fourteenth Amendment where it was "arbitrary, capricious, unreasonable, or wholly unrelated to the competency of the state in determining its educational policy." In this case, the district court found that, under *Sims*, Kaech's conduct was clearly unconstitutional as of 1982, the first incident of a plaintiff being abused and the year Yontz became principal. App. 52a. Because the Sixth Circuit relied on its own precedents in deciding this case, the court of appeals did not find it necessary to address whether or not *Sims* had clearly established that conduct such as Kaech's was constitutionally impermissible.

at HES, the relevant test for a student's right to bodily security in school was enunciated in *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980). This test is as follows:

> As in the cognate police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.

Id.

Within the 1982-91 period relevant to this case, the Sixth Circuit adopted and applied the *Hall* test *in toto*. *Webb v. McCullough*, 828 F.2d 1151, 1159 (6th Cir. 1987). *Webb* is a particularly useful paradigm for purposes of the instant case. In *Webb*, a school official (McCullough) broke down a door, which hit a student. He then grabbed the student, threw her against a wall, and slapped her. *Webb*, 828 F.2d at 1154. In *Webb*, the Sixth Circuit concluded that a reasonable trier of fact could find that "the alleged blows were a brutal and inhumane abuse of McCullough's official power, literally shocking to the conscience." *Id.* at 1159. Therefore, the Sixth Circuit held in *Webb* that, under the *Hall* test, the district court had improperly granted summary judgment to the defendant. *Id.* The cause was remanded for a jury to determine whether or not the alleged blows violated the plaintiff's substantive due process rights under the Fourteenth Amendment.

In the instant case, the conduct that plaintiffs attributed to Kaech was at least as "cruel and inhumane" and "shocking to the conscience" as that alleged against the defendant in *Webb*. In *Webb*, the Sixth Circuit concluded that the single, momentary instance of abuse to which the plaintiff was subjected could serve as the basis for a valid substantive due process claim; the eleven plaintiffs in this case endured comparable – in some instances, more severe – physical and mental abuse at the hands of Kaech *over a nine-year period*. Thus, the Sixth Circuit was correct when it concluded in this case that, under *Hall* and *Webb*, Kaech's alleged abusive conduct was violative of the Fourteenth Amendment and was clearly established as such during the relevant period. App. 7a. Yontz noticeably has failed to point out *any* decision rendered by this Court, the Sixth Circuit, or the District Court for the Southern District of Ohio, whether before or within the 1982-91 period, which might have suggested to a reasonable school official in Yontz's position that Kaech's conduct was constitutionally permissible. The Sixth Circuit properly sustained the district court's conclusion that Kaech's conduct violated plaintiffs' constitutional rights under "clearly established law," as viewed during Yontz's tenure as principal.

Finally, the Sixth Circuit took note of Yontz's contention that plaintiffs had not produced sufficient evidence to support the allegations on which plaintiffs based their § 1983 claim against Kaech. App. 7a. Citing this Court's decision in *Johnson v. Jones*, 115 S.Ct. 2151, 2156 (1995), however, the Sixth Circuit properly refused to delve into Yontz's evidentiary argument. App. 7a. In *Johnson*, this Court held that "sufficiency of the evidence" issues are not reviewable in a *Mitchell v. Forsyth* appeal.

Johnson, 115 S.Ct. at 2156.[7] *Johnson* added that, in a *Mitchell* appeal from denial of summary judgment, the *only* issue that an appellate court should decide is a purely legal issue, which limits the inquiry to whether the district court correctly found violations of "clearly established rights" under the test of *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) 115 S.Ct. at 1256. In reviewing a district court's conclusion in a qualified immunity case that a "clearly established right" has been violated, *Johnson* stated that an appellate court could "take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." *Id.* at 2159.

Yontz's two "clearly established rights" arguments were and are undoubtedly dependent on his own self-serving version of the facts. Yontz essentially confirms this fact: at pages 12-13 of his Petition, he asserts that plaintiffs' allegations "do not implicate the substantive due process protections of the Fourteenth Amendment." Yontz asks this Court – just as he asked the Sixth Circuit – to assess this argument based not on the evidence presented by plaintiffs, but on his own self-serving affidavit. Petition, p. 12. Yontz's version of the facts, as reflected in his affidavit, obviously conflicts sharply with plaintiffs' version of the facts, as reflected in the record evidence. As it was obligated to do in resolving Yontz's motion for summary judgment, the district court viewed the conflicting evidence in the light most favorable to plaintiffs, the non-moving party. Under *Johnson*, the Sixth Circuit was correct (a) in taking, as given, the version of the facts on which the district court relied when it found

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[7] At page 26 of his principal brief below, Yontz asked the Sixth Circuit to reach precisely such an issue.

that Kaech's conduct violated clearly established law, and (b) in refusing to be drawn into reviewing the sufficiency of plaintiffs' evidence to support "the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." *Id.* at 2159. By tendering the same self-serving evidentiary analysis here with respect to whether or not Kaech's conduct violated clearly established law, defendant is essentially inviting this Court to deviate from the course it explicitly endorsed in *Johnson*. The Court should reject this invitation.

II.

THE SIXTH CIRCUIT CORRECTLY CONCLUDED THAT THE UNLAWFULNESS OF YONTZ'S SUPERVISION OF KAECH, AND HENCE HIS LIABILITY FOR HER CONDUCT, WOULD HAVE BEEN APPARENT TO A REASONABLE SCHOOL OFFICIAL IN YONTZ'S POSITION BASED ON RELEVANT CASES THAT WERE DECIDED BEFORE OR WITHIN THE 1982-91 TIME FRAME.

Yontz also contends that, even if Kaech's conduct clearly violated plaintiffs' constitutional rights under *Webb* and its forebears, *his* potential liability for Kaech's conduct was not clearly established before or within the 1982-91 period. This argument is also untenable.

Had Yontz reviewed the Sixth Circuit's decision in *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982), on the day he became principal at HES, he would have known that at least since

Rizzo v. Goode, 423 U.S. 362 (1976), federal courts had been imposing liability on supervisors for the unconstitutional acts of their subordinates. Moreover, a reasonable supervisor in Yontz's position could easily have discerned from the *Hays* decision the Sixth Circuit's test for supervisory liability under § 1983. In *Hays*, the Sixth Circuit held that a supervisor may be held liable for the unconstitutional acts of one of his subordinates if the supervisor "implicitly authorized, approved, or knowingly acquiesced in" the subordinate's offending conduct. *Hays*, 668 F.2d at 874.

Yontz contends he could not have known of his potential liability under the *Hays* test because he, unlike the defendant in *Hays*, claimed never to have had any "direct knowledge" of his subordinate's unconstitutional behavior. Petition, p. 23.[8] This position fails for two reasons.

First, Yontz's argument that he had no direct knowledge of Kaech's unconstitutional behavior, like his

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[8] Yontz also implies that his potential liability for Kaech's conduct would not have been apparent from a review of *Hays* because *Hays* is a police brutality case, while the conduct at issue here took place "in a school setting . . . ." Petition, p. 24. In this regard, plaintiffs remind the Court that the Sixth Circuit's test for determining the constitutionality of abusive conduct in a school setting was borrowed from police brutality cases. *Webb v. McCullough*, 828 F.2d at 1159, quoting *Hall v. Tawney*, 621 F.2d at 613 ("Just as in police brutality cases, due process is violated by a school official if the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise zeal that it amounted to a brutal and inhumane use of official power literally shocking to the conscience."). Yontz could not reasonably have harbored the illusion that, while Kaech's underlying conduct would be held up to the standard enunciated in police brutality cases, his own conduct would be held up to a standard different from that applied to supervisors in police brutality cases.

argument that Kaech's behavior was not unconstitutional, hinges on a "sufficiency of the evidence" analysis that seeks to focus the Court's attention on Yontz's own self-serving affidavit, rather than on inferences the district court drew from plaintiffs' evidence.[9] Compare Petition, pp. 26, 28-9 with App. 37a, 38a, 40a, 58a. For the same reasons discussed in Section I, *ante*, the Court should reject Yontz's invitation to deviate from *Johnson*, 115 S.Ct. at 2156, and to delve into an "evidence sufficiency" analysis. The only proper course is for this Court – like the Sixth Circuit before it – to take, as given, the version of the facts on which the district court relied in denying summary judgment.[10] In this regard, the district court described long-term abuse by Kaech and a pattern of deliberate indifference to Kaech's abuse, which began before and continued after Yontz became principal. For instance, the district court indicated that a reasonable trier of fact could find that Kaech slammed pupils' faces into their desks. App. 59a. In one instance, a grandmother of one child reported that Kaech injured the child twice in a few months. Yontz told her nothing happened and refused to set up a meeting with Kaech and the grandmother. App. 37a. One plaintiff complained to Yontz that Kaech had hit her, leaving a bruise. Yontz believed Kaech's denial and did nothing. *Id.* In 1990, a mother complained that Kaech had abused

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[9] Yontz's reliance on his own version of the facts, rather than on the facts assumed by the district court, distinguishes the situation presented by the instant Petition from that present in *Behrens v. Pelletier*, 116 S.Ct. 834, 842 (1996).

[10] The Sixth Circuit noted, "[Yontz] contends that Plaintiffs have not produced sufficient evidence to establish genuine issues of material fact as to . . . whether Yontz was deliberately indifferent to Plaintiffs' complaints." App. 7a. Citing *Johnson*, the Sixth Circuit concluded, "[W]e may not consider Yontz's fact-related arguments in this appeal." App. 7a.

her daughter. Yontz said he could never believe one of his teachers would do something like that. *Id.* A mother of one plaintiff complained to Yontz that Kaech scratched her son with a pencil. Kaech denied it. Yontz believed Kaech without ever talking to the child. *Id.* In 1991, a mother complained to Yontz that Kaech had pushed her daughter out of a desk, causing a knee injury. Yontz told the mother to prepare a complaint and that, if she did, he would have to do something about it. In response, Yontz did what he always did – he believed Kaech. *Id.* As the district court stated, construing the evidence in the manner most favorable to plaintiffs, Yontz knew of a pattern of abuse by Kaech; however, he demonstrated deliberate indifference to plaintiffs' constitutional rights and, by acquiescing in the conduct, Yontz thereby caused more of it. App. 40a, 38a n. 30. In short, the evidence relied upon by the district court fully supports the Sixth Circuit's conclusion, based on *Hays*, that plaintiffs asserted violations of clearly established law *by Yontz*.

Second, a reasonable supervisor in Yontz's position would have learned from *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1989) (quoting *Hays*), and *City of Canton v. Harris*, 489 U.S. 378 (1989), that, when a supervisor displays "deliberate indifference" to his subordinates' unconstitutional acts (as plaintiffs' evidence suggested Yontz did), § 1983 liability may result. Had Yontz read *Leach*, it would surely have disabused him of the notion he advanced before the Sixth Circuit as a basis for qualified immunity, i.e., that his "see no evil" approach to Kaech's misconduct was sufficient to

preclude § 1983 liability.[11]

[11] Significantly, in *Leach*, the Sixth Circuit, borrowing from *Hays*, found "deliberate indifference" based not just on what the supervisor knew, but also what he "should have known" about the constitutionality of his subordinates' conduct. *Leach*, 891 F.2d at 1246. This analysis, of course, is consistent with *Anderson v. Creighton*, 107 S.Ct. at 3040 (1987), in which this Court stated that the defendant's subjective beliefs about the permissibility of the allegedly unconstitutional conduct are irrelevant.

CONCLUSION

The unlawfulness of both Kaech's conduct and Yontz's supervisory behavior would have been apparent from a review of the cases cited in the Sixth Circuit's decision and in this brief. *Anderson v. Creighton*, 483 U.S. at 640. All of these cases were decided by this Court, the Sixth Circuit, or the District Court for the Southern District of Ohio either before or within the relevant 1982-91 time frame. The Sixth Circuit was correct in so holding. For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

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NOT RECOMMENDED FOR PUBLICATION

Nos. 94-3767 and 94-3770

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMY D. ADAMS, et al.	)	
	)	
Plaintiffs-Appellees,	)	
	)	ON APPEAL FROM
	)	THE UNITED STATES
v.	)	DISTRICT COURT
	)	FOR THE SOUTHERN
	)	DISTRICT OF OHIO
RICHARD YONTZ,	)	
	)	
Defendant-Appellant	)	
	)	

BEFORE: MARTIN, JONES, Circuit Judges; and

BELL, District Judge*

PER CURIAM. This is a § 1983 case. Plaintiffs, eleven former and current elementary school students, allege that Defendant Richard Yontz and several other co-Defendants violated their substantive due process rights. Yontz invoked qualified immunity, and the district court granted in part and denied in part his claim. Yontz appeals that decision, and we affirm.

Plaintiffs were enrolled in a special education program for the deaf and hearing impaired at Highlands Elementary School ("HES") in Springfield, Ohio. HES is located in Springfield City School District ("SCSD"). Defendant Beverly Kaech served as Plaintiffs' instructor. Plaintiffs accuse Kaech of inflicting physical and mental abuse on them from 1980 to January 1991. According to Plaintiffs, Kaech hit them, shoved them, threw books at them, yelled at them, and insulted them. Several Plaintiffs claim that Kaech caused them serious physical injury. Kaech denies Plaintiffs' allegations.

Yontz served as HES principal from 1982 to 1991, during which most of these alleged incidents occurred. Plaintiffs claim that they submitted several oral and written complaints about Kaech to Yontz and the SCSD. They maintain that Yontz invested little time and effort in responding to these complaints. J.A. at 114-17. Yontz,

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* The Honorable Robert Holmes Bell, District Judge, United States District Court for the Western District of Michigan, sitting by designation.

however, claims that he never saw Kaech abuse Plaintiffs. He also insists that he only received three complaints and that he adequately investigated each of these claims.

On April 10, 1992, Plaintiffs filed a Complaint naming Kaech, Yontz, and SCSD as Defendants. In their § 1983 claim against Yontz, they asserted that Yontz was "under a duty to protect [them]" from Kaech because they enjoyed a "special custodial relationship" with Yontz. J.A. at 66. Moreover, they alleged that Yontz's indifference towards their allegations against Kaech resulted in a violation of their substantive due process rights. *Id.* at 66-7.

On May 3, 1993, after nearly a year of discovery, Yontz moved for summary judgment on the basis of qualified immunity. He argued that Plaintiffs had failed to establish an actionable constitutional right to be protected from Kaech's abusive conduct because he did not have a special custodial relationship with them. J.A. at 188-89. Yontz also averred that Plaintiffs failed to allege that his indifference constituted a violation of clearly established law. *Id.* at 191-93.

On March 31, 1994, the district court sustained in part and overruled in part Yontz's request for qualified immunity. While the court agreed with Yontz that he had no affirmative duty to protect Plaintiffs, it refused Yontz full qualified immunity. The court reasoned that under clearly established law, Yontz could be held liable for Kaech's abusive conduct because he served as Kaech's supervisor. J.A. at 145. On July 14, 1995, Yontz filed a Notice of Appeal. Plaintiffs moved the court to certify

Yontz's appeal as frivolous. Yontz also filed a Motion to Stay Trial Pending Appeal, in which he maintained that Plaintiffs had not asserted a clearly established right so as to assign him liability. J.A. at 1148-51. In an expanded opinion filed July 25, 1994, the district court reaffirmed its earlier decision to deny Yontz full qualified immunity, certified his appeal as frivolous, and denied Yontz's Motion to Stay Trial. J.A. at 1162-77. The district court ordered the parties to proceed to trial; however, it granted Yontz leave to appeal both of its decisions. This consolidated appeal followed.

Yontz presents two issues on appeal. The first issue is whether the district court erred in refusing him summary judgment on the basis of qualified immunity. The second issue is whether the district court erred in certifying his appeal as frivolous.

I.

A. Yontz's Motion for Summary Judgment

The first issue involves the court's denial of summary judgment. "We review a district court's grant [or denial] of summary judgment *de novo*." *Russo v. City of Cincinnati*, 953 F.2d 1036, 1041 (6th Cir. 1992) (citing *Vollrath v. Georgia-Pacific Corp.*, 899 F.2d 533, 534 (6th Cir.), *cert. denied*, 498 U.S. 940 (1990)). Yet this interlocutory appeal presents questions of qualified immunity which are "conceptually distinct from the merits of the plaintiff's claim." *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985). As a result, the sole issue facing the court in *Forsyth* appeals is "whether the legal norms

allegedly violated by the defendant were clearly established at the time of the challenged actions." *Id.* at 528; *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1981).

Once a § 1983 defendant has claimed qualified immunity, the plaintiff carries the ultimate burden of proving that the claimed right is clearly established so as to defeat the defendant's qualified immunity claim. *Wegener v. Covington*, 933 F.2d 390, 392 (6th Cir. 1991). In doing so, the plaintiff may draw from: i) Supreme Court precedent; ii) Sixth Circuit precedent; or iii) cases from other circuits which "point unmistakenly to the unconstitutionality of the conduct and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable [official] that his conduct was unconstitutional." *Mumford v. Zieba*, 4 F.3d 429, 432-33 (6th Cir. 1993).

In order to determine whether a § 1983 defendant violated a "clearly established" right, the reviewing court must employ an "objective reasonableness" test. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Under this test, "the contours of the [claimed] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* In other words, "in the light of pre-existing law the unlawfulness must be apparent." *Id.* Consequently, "[i]f officials of reasonable competence objectively could disagree on the law, immunity should be recognized." *Cameron v. Seitz*, 38 F.3d 264, 272 (6th Cir. 1994) (quoting *Mumford*, 4 F.3d at 432).

Applying these principles to the case at bar, the

relevant inquiry for the purposes of our qualified immunity analysis is whether the law clearly established supervisory liability on principals for the unconstitutional actions of their subordinates at the time that the alleged incidents occurred. We believe that it did. In *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir.), *cert. Denied*, 459 U.S. 833 (1982), this court held that § 1983 claimants may maintain a cause of action against a supervisory official if they can prove that "at least *implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.*" *Id.* (emphasis added); *quoted in Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1989), *cert. denied.* 495 U.S. 932 (1990). The Third Circuit, moreover, specifically authorized supervisory liability claims against principals for the abusive conduct of teachers in *Stoneking v. Bradford Area School Dist. (Stoneking II)*, 882 F.2d 720, 730 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). Therefore, the law has been clearly established since at least 1982 that Yontz could be held liable as a supervisory official for the constitutional torts of his subordinates. *Id.; Hays*, 668 F.2d at 874.

In order for an official to be held liable under a theory of supervisory liability, the underlying conduct of his subordinate must violate clearly established law. *Hays*, 668 F.2d at 874. In *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980), the Fourth Circuit held that the substantive due process rights of students are violated when a teacher applies force which "cause[s] injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and

inhumane abuse of official power literally shocking to the conscience." This circuit adopted the *Hall* standard in *Webb v. McCullough*, 828 F.2d 1151, 1158-59 (6th Cir. 1987) Thus *Hall* and *Webb* explicitly state that the Fourteenth Amendment proscribes the abusive conduct which Plaintiffs allege against Kaech. Consequently, Kaech's conduct could result in supervisory liability against Yontz if it is proven at trial that he was deliberately indifferent to such conduct. *Hays*, 668 F.2d at 874. Yontz, however, contends that Plaintiffs have not produced sufficient evidence to establish genuine issues of material fact as to whether Kaech unconstitutionally abused her students or whether Yontz was deliberately indifferent to Plaintiffs' complaints. This court, however, may not address sufficiency of the evidence claims on appeal. *Johnson v. Jones*, 115 S.Ct. 2151, 2157 (1995). The *Johnson* Court noted that *Forsyth* appeals involve a pure question of law; thus, "an appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim." *Id.* at 2156. The court reasoned that "an interlocutory appeal concerning [factual issues] ... makes unwise use of the appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision." *Id.* at 2158. Therefore, we may not consider Yontz's fact-related arguments in this appeal. *Id.*

Because Plaintiffs have asserted violations of clearly established law against Yontz, and because Yontz's factual arguments are not properly addressed on appeal,

we uphold the district court's denial of Yontz's Motion for Summary Judgment on grounds of qualified immunity.

B. Certification of Yontz's Appeal as Frivolous

Yontz's second argument on appeal is that the district court improperly dismissed his appeal as frivolous. We agree. In doing so, we rely on *Dickerson v. McClellan*, 37 F.2d 251 (6th Cir. 1994). *Dickerson* involved facts which are substantially similar to those presented in this case. In *Dickerson*, the district court denied the defendants qualified immunity, and the defendants filed a notice of appeal. *Id.* The plaintiffs moved to certify defendants' appeal as frivolous, and the district court granted that motion. *Id.* at 252. Thereafter, the district court dismissed the defendants' notice of appeal. This court vacated the ruling of the district court, reasoning that "[a] proper notice of appeal divests the court of jurisdiction and transfers jurisdiction to the court of appeals." *Id.* (citing *Lewis v. Alexander*, 987 F.2d 392, 394 (6th Cir. 1993)). In light of *Dickerson*, we find that the district court's decision to certify Yontz's *Forsyth* appeal as frivolous was in error.

II.

For the reasons stated herein, we **AFFIRM** the decision of the district court denying Yontz's Motion for Summary Judgment, and **VACATE** the district court's certification of Yontz's appeal as frivolous.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

AMY D. ADAMS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No.
	)	C-3-92-157
BEVERLY KAECH, et al.,	)	JUDGE WALTER
	)	HERBERT RICE
Defendants.	)	

EXPANDED OPINION SETTING FORTH COURT'S REASONS FOR SUSTAINING IN PART AND OVERRULING IN PART MOTION OF DEFENDANTS SPRINGFIELD CSD AND YONTZ TO STRIKE (DOC. #83); EXPANDED OPINION SETTING FORTH COURT'S REASONS FOR SUSTAINING IN PART AND OVERRULING IN PART MOTION OF DEFENDANTS SPRINGFIELD CSD AND YONTZ FOR SUMMARY JUDGMENT (DOC. #58); PLAINTIFFS GIVEN LEAVE TO FILE LIMITED AMENDED COMPLAINT

This case arises out of allegations that Defendant Beverly Kaech ("Kaech") mistreated some of the students

she taught at Highlands Elementary School ("Highlands"). Highlands is located in Springfield, Clark County, Ohio, and is operated by Defendant Springfield City School District ("Springfield CSD"). Kaech taught children with hearing disabilities, who were in grades three, four and five. In February, 1991, after allegations of Kaech's mistreatment of her students surfaced, Darrell Heckman ("Heckman"), the part-time county prosecutor for Champaign County, Ohio, was appointed to investigate and to prosecute the allegations. Heckman prosecuted Kaech for child endangering, by cruelly abusing a child, in violation of Ohio Revised Code § 2919.22(B)(2). The prosecution ended on September 20, 1991, when the trial judge entered a judgment of acquittal in favor of Kaech.

On April 10, 1992, the Plaintiffs[1] initiated this action, in which they allege that Kaech physically and emotionally abused them. Plaintiffs assert claims under federal and state law against Kaech and federal claims against Springfield CSD and Richard Yontz ("Yontz"), who was the principal at Highlands. In particular, Plaintiffs set forth, in their complaint (Doc. #1), the following claims, to wit: 1) state law claims for assault, battery and the intentional infliction of emotional distress against Kaech (Counts I-IX)[2]; 2) a claim under 42 U.S.C. § 1983 against Kaech, in which they allege that Kaech deprived them of their liberty interest to bodily security and physical integrity guaranteed by the Fourteenth Amendment, a substantive due process claim (Count X);

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[1] The Plaintiffs are Kaech's former students or parents of such students.

[2] One such count is set forth for each of the nine Plaintiffs.

3) a state law claim for the negligent infliction of emotional distress, against Kaech (Count XI); 4) a § 1983 claim against Yontz, in which they allege that Yontz was recklessly indifferent to the incidents of abuse allegedly committed by Kaech, which indifference caused them to suffer a deprivation of their liberty interest to bodily security and physical integrity guaranteed by the Fourteenth Amendment (Count XII); 5) a § 1983 claim against Springfield CSD, in which Plaintiffs allege that a custom, practice or policy of the school district created a climate whereby Kaech could abuse her students (Count XIII); and 6) a claim for punitive damages against all Defendants (Count XIV).

After initial pretrial discovery, Springfield CSD and Yontz moved for summary judgment. See Doc. #58. In opposition to that motion for summary judgment, Plaintiffs filed an extensive appendix containing affidavits and other evidence. See Doc. #79. Springfield CSD and Yontz, in turn, moved to strike much of the evidence presented by the Plaintiffs. See Doc. #83. On March 30, 1994, this Court entered an Order sustaining in part and overruling in part the motion of Springfield CSD and Yontz to strike (Doc. #83). See Doc. #117. The following day, March 31, 1994, this Court entered an Order sustaining in part and overruling in part the motion of Springfield CSD and Yontz for summary judgment (Doc. #58). See Doc. #119. In this expanded Opinion, the Court sets forth its reasons, together with citations to authority, for sustaining in part and overruling in part the motions of Springfield CSD and Yontz to strike (Doc. #83) and for summary judgment (Doc. #58).

I. Motion of Springfield CSD and Yontz to strike (Doc. #83)

With their motion to strike, Springfield CSD and Yontz seek to have the Court strike the following evidentiary materials, to with: 1) portions from the affidavit of Jean W. Hrinko ("Hrinko"); 2) portions from the affidavit of Glinda Sprague ("Sprague"); 3) portions from the affidavit of Charlotte Attenweiler ("Attenweiler"); 4) portions from the affidavit and reports of Joseph V. Cresci, M.D. ("Cresci"); 5) police interviews; 6) Yontz' January 31, 1991, statement; and 7) the January 30, 1991, statement of Jane Roark ("Roark").[3]

As a means of analysis, the Court will initially set forth certain general legal standards which apply to many of the items of evidence, which Springfield CSD and Yontz seek to have stricken. Rule 56(e) of the Federal Rules of Civil Procedure provides that "affidavits shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence." The Sixth Circuit has consistently held that Rule 56(e) mandates that affidavits which consist only of hearsay or inadmissible opinion evidence must be disregarded. *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 968 (6th Cir. 1991); *State Mut. Life Assur. Co. v. Deer Creek Park*, 612 F.2d 259, 264 (6th Cir. 1979). Similarly, a court must disregard rumors, conclusory allegations and the affiant's subjective beliefs. *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992). When an affidavit contains a statement which is hearsay and which also has a non-hearsay purpose (i.e., a purpose other than to prove the truth of the matter asserted in the statement), a court may

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[3] These evidentiary materials are part of Doc. #79.

consider the statement for (and only for) its non-hearsay purpose. See Rule 801(c); *United States v. Pulley*, 922 F.2d 1283, 1287-88 (6th Cir. 1991) (Court properly admits hearsay testimony for its non-hearsay purpose). Of course, a court will only disregard that portion of the affidavit which is objectionable. *Wimberly v. Clark Controller Co.*, 337 F.2d 225, 227 (6th Cir. 1966); 10A Wright, Miller & Kane, Federal Practice and Procedure, § 2738 at 509-11. A motion to strike is the appropriate procedural mechanism for a party to challenge affidavits and other evidentiary materials which have been presented in support of or in opposition to a motion for summary judgment. *Id.* at 507-09. Indeed, when a party fails to move to strike such affidavits or other evidence, a court does not commit error by considering same. *Moore v. Holbrook*, 2 F.3d 697, 699 (6th Cir. 1993). With these general standards in mind, the Court turns to the parties arguments regarding the various items of evidence, addressing them in the above order.

First, Springfield CSD and Yontz argue that Hrinko's affidavit,[4] in particular ¶¶ 4-8, contain inadmissible heresay; therefore, the affidavit must be stricken. The Court agrees with these Defendants that ¶¶ 6 and 7 contain only inadmissible hearsay. In these paragraphs of her affidavit, Hrinko sets forth allegations of abuse by Kaech, which were told to her by a student, Jon DuPree ("DuPree"), and the cook at Highlands, Mary Haynes ("Haynes"). In ¶ 6, Hrinko sets forth incidents of abuse which were related to her by DuPree. Plaintiffs argue that the DuPree's statement, set forth by Hrinko

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[4] Hrinko was a teacher at Highlands during the 1977 school year, the time at which the incidents she relates in her affidavit occurred. Hrinko's affidavit is Tab 2 of Doc. #79.

in ¶ 6 of her affidavit, comes within the exception to the hearsay rule for excited utterances. See Rule 803(2). A excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* The flaw in Plaintiffs' argument is that they have not laid a foundation, demonstrating that DuPree's statement was an excited utterance. In other words, Hrinko's affidavit does not contain sufficient facts for the Court to determine that DuPree made the statement while he was "under the stress of excitement caused by the event or condition." Rather, in ¶ 6, Hrinko merely states that DuPree approached her and told her that Kaech had slapped him in the face. Therefore, the Court sustains the motion to strike, as it relates to ¶ 6, and will not consider it in ruling on the motion for summary judgment; however, that conclusion will not necessarily prevent Hrinko from testifying about DuPree's statement, at trial, assuming a proper foundation can be laid. In ¶ 7, Hrinko states that Haynes told her that she observed Kaech become upset with and slap a number of students. Although Haynes was apparently an employee of Springfield CSD, there is simply no evidence that she was authorized to make that statement or that it concerned a matter which was within the scope of her agency. Therefore, the Court concludes that the statement of Haynes was not the admission of an agent of a party opponent, as that term is used in Rule 801(d)(2)(D). Accordingly, the Court strikes ¶ 7 from Hrinko's affidavit and will not consider same when ruling on the motion for summary judgment.

The Court does not agree with Springfield CSD and Yontz that ¶ 4, 5 and 8 of that affidavit contain inadmissible hearsay, and, thus, must be stricken. In ¶ 4, Hrinko states that, following an incident in which she saw

Kaech shake and slap a student, Aaron Kneisley ("Kneisley"), in the face,[5] Kneisley told her that Kaech hit him often for no apparent reason. In ¶ 5, Hrinko states that, as a result of the incident involving Kneisley and Kaech, she personally approached George Koerner ("Koerner"), who was then the principal at Highlands, and told him that she wanted to speak with him about a teacher. Koerner's response was that he did not want to hear complaints about any teacher. With respect to ¶ 4, Hrinko's statement has a non-hearsay purpose (i.e., the statement has an evidentiary purpose beyond proving the truth of the matter asserted therein), as it explains, in part, her attempt to speak with Koerner. See Rule 801(c). Therefore, when ruling on the motion for summary judgment, the Court will consider ¶ 4 of Hrinko's affidavit, although not for the purpose of proving the truth of Kneisley's statement.[6] With respect to ¶ 5, the Court does not consider Koerner's statement to be hearsay. At the time he made it, Koerner was the principal at Highlands and was authorized to make statements regarding complaints about teachers; therefore, Koerner's statement was one by an agent of a party opponent. See Rule 801(d)(2)(D). Koerner's statement may also be considered for the non-hearsay purpose of showing that he had notice of complaints of

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[5] Hrinko relates the incident in ¶ 3 of her affidavit.

[6] Plaintiffs argue that Kneisley's statement was an excited utterance; thus, it comes within an exception to the hearsay rule. See Rule 803(2). This Court does not agree. Simply stated, Hrinko does not indicate, in her affidavit, that Kneisley made the statement while under the stress of being hit by Kaech or having been hit by her. Thus, Plaintiffs have failed to demonstrate that Kneisley's statement was an excited utterance.

abuse – whether or not those complaints were true. Accordingly, when ruling on the motion for summary judgment, the Court will consider ¶ 5 of Hrinko's affidavit. In ¶ 8 of her affidavit, Hrinko stated that two students, Heather Watkins and Kimberly Beverley, would come into her classroom, crying, after leaving Kaech's classroom and tell her (Hrinko) that they had been hit by Kaech. The Court agrees with Plaintiffs that the statements of Watkins and Beverley were excited utterances. Hrinko's statement that the two students would come crying into her classroom is sufficient to lay a foundation that the students told her that they had been hit by Kaech, while under the stress of excitement caused by having been hit. Therefore, the Court overrules the motion to strike, as it relates to ¶ 8 of Hrinko's affidavit and will consider same when ruling on the motion for summary judgment.[7]

Second, Springfield CSD and Yontz argue that ¶¶ 3, 4 & 8 in Sprague's affidavit should be stricken.[8] Sprague is the mother of Kimberly Beverley ("Beverley"), a student of Kaech's during the 1978-79 and 1979-80 school years. With respect to ¶ 3, these Defendants argue that Beverley's statement, through Sprague, that Kaech had caused the scratches on her arm are inadmissible hearsay. The Court does not agree, the allegedly, objectionable statements have a non-hearsay purpose; they explain why Sprague took certain subsequent actions. See Rule 801(c). Therefore, the Court will

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[7] The Court will also consider ¶¶ 1-3 of that affidavit, because that do not appear to contain hearsay and because the Defendants have not specifically argued that the statements contained in those paragraphs should be stricken.

[8] Sprague's affidavit is Tab 3 of Doc. #79.

consider Sprague's recitation of Beverley's statements contained in ¶ 3 of the former's affidavit, although not for the truth of Beverley's statements. In ¶ 4 of her affidavit, Sprague states that, after Beverley told her that Kaech had caused the scratches on her arm, Sprague "immediately called Thomas Payton, the Superintendent of Schools and was able to discuss my observations and concerns about Beverly Kaech with his office." Springfield CSD and Yontz contend that Sprague's statement, that she was able to discuss her observations and concerns with Payton's "office," must be stricken because it is not relevant. These Defendants argue that the statement is not relevant because it does not demonstrate that Payton or anyone in his office had notice of Kaech's actions. This Court does not agree. Sprague's telephone call to Payton and her conversation with that office does make it more likely than not that the Superintendent of Defendant Springfield CSD had notice of Kaech's actions regarding Beverley.[9] See Rule 401. In ¶ 8 of her affidavit, Sprague talks about a meeting she had with Koerner, Kaech and Kaech's attorney. During that meeting, Sprague told Koerner about incidents of physical contact between her daughter and Kaech. In addition, Sprague states that "I also informed George

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[9] These Defendants also argue that the statement in ¶ 4 of Sprague's affidavit is not relevant because she informed an inanimate object, an office, of her observations and concerns regarding Kaech. That somewhat unique argument is without merit. Plaintiffs have submitted Sprague's affidavit as part of their evidence opposing the motion for summary judgment. As such, this Court is obligated to construe that evidence in the light most favorable to the Plaintiffs. *Kentucky Div. Horseman's Benev. v. Turfway Park*, 20 F.3d 1406, 1411 (6th Cir. 1994). A fair (and the only reasonable) construction of Sprague's statement is that she conversed with a person in the office and not merely with the office itself.

Koerner during that meeting that I was aware that other students had been abused by Beverly Kaech." Springfield CSD and Yontz argue that the quoted sentence must be stricken because it is hearsay and rumor. The Court does not agree. Once again, this statement is offered for a non-hearsay purpose, to demonstrate that Koerner was told about and had notice of allegations of abuse by Kaech, whether such allegations were true or not. See Rule 801(c). However, the Court will not consider that statement for the purpose of proving the truth of what is asserted therein (i.e., that other students had been abused by Kaech). Based upon the foregoing, the Court overrules the motion to strike (Doc. #83), as it relates to Sprague's affidavit.[10]

Third, Springfield CSD and Yontz move to strike ¶¶ 4, 8 and 11 of Attenweiler's affidavit.[11] Attenweiler, who taught hearing impaired students for Springfield CSD from 1972 until 1983, sets forth, in ¶¶ 2-4 of her affidavit, her personal observations of Kaech, as a teacher. In one sentence of ¶ 4, Attenweiler states that "[a]s time went on, it was my impression that Beverly Kaech expected perfection from the children." In ¶¶ 5-7 and 9-10, Attenweiler sets forth details regarding various meetings she had with officials of the Springfield CSD, including Payton and Koerner. In ¶ 11, Attenweiler states:

> Throughout the numerous meetings I attended as set forth above, I had the

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[10] The Court will also consider the portions of Sprague's affidavit to which the Defendants have not specifically objected.

[11] Attenweiler's affidavit is Tab 4 of Doc. #79.

> impression that the method of handling the allegations against Beverly Kaech was to monitor Kimberly Beverly [sic] daily as she left Beverly Kaech's class and to accomplish the transfer of students, including Kimberly Beverly [sic], to another teacher. I was left with the further impression that there would be no investigation of the allegations and that the administration was desirous of handling the matter quietly.

Springfield CSD and Yontz argue that the quoted sentences from ¶ 4 and ¶ 11 must be stricken because Rule 56(e) does not allow affidavits that set forth an affiant's conclusions or beliefs and that Attenweiler's impressions are nothing more than her beliefs. Plaintiffs, on the other hand, argue that these Defendants are engaging in a semantic argument and that Attenweiler had the opportunity to observe Kaech's students. The Court does not agree with Springfield CSD and Yontz that the quoted sentences from ¶ 4 and ¶ 11 of Attenweiler's affidavit must be stricken. Those portions of her affidavit are not merely conclusory allegations or statements of subjective beliefs; rather, construing the evidence in the manner most favorable to the Plaintiffs, the Court concludes that Attenweiler's impressions are proper lay opinion testimony under Rule 701. To determine whether an affidavit or portion thereof) may be considered in ruling on a motion for summary judgment, a court must decide whether the affidavit sets forth "facts as would be admissible in evidence." Rule 56(e). Applying that language, courts have held that lay and expert opinions in affidavits, which are proper under Rule 701 or Rule 702, may be considered in ruling on a motion for summary judgment. *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992); *In re Taubman*, 160 B.R. 964,

976 (Bkrtcy. S.D. Ohio 1993). Under Rule 701, lay opinion testimony is admissible if it is:

> (a) rationally based on the perception of the witness and
> (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

The quoted sentences from ¶ 4 and ¶ 11 of Attenweiler's affidavit are both based upon her personal perceptions of events (with respect to ¶ 4, Kaech's manner of teaching, and with respect to ¶ 11, meetings which Attenweiler attended). Moreover, the statements are helpful to a clear understanding of Attenweiler's testimony and to the determination of a fact in issue, in particular, the reaction of officials at Springfield CSD to allegations of abuse against Kaech. The Court will not strike the quoted sentences from ¶ 4 or ¶ 11 from that affidavit and will consider the statements contained therein in ruling on the motion for summary judgment.[12]

In ¶ 8 of her affidavit, Attenweiler sets forth what she was told by Betty Eckels, an official from the Springfield Education Association, a non-party to this litigation. That statement is unquestionably hearsay. Accordingly, the Court will strike the quoted sentences from ¶ 8 of Attenweiler's affidavit and will not consider the statements contained therein when ruling on the motion for summary judgment.

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[12] The Court will consider the portions of Attenweiler's affidavit to which Defendants have not specifically objected.

Fourth, Springfield CSD and Yontz present a number of arguments in support of their contention that ¶¶ 4 and 5 of Cresci's affidavit and reports must be stricken.[13] Cresci is a psychiatrist who was retained by Plaintiff's counsel to provide evaluations and recommendations for treatment of the students of Kaech who are either Plaintiffs or the children of Plaintiffs. In his affidavit and in the reports, Cresci sets forth his evaluations of these students, opining that they had suffered various types of abuse from Kaech. The Court deems it unnecessary to address the arguments of Springfield CSD and Yontz regarding Cresci's affidavit and report, because these Defendants do not argue, in their motion for summary judgment, that they are entitled to summary judgment on the basis that Kaech did not abuse her students. Cresci's affidavit and reports are, therefore, of no relevance to the motion for summary judgment. Therefore, any questions relating to the ability of Cresci to present evidence, for consideration by the Court or the jury, are not yet ripe for adjudication. Accordingly, the Court will not consider Cresci's affidavit and reports when ruling on the motion for summary judgment;[14] therefore, the Court overrules the motion to strike, as moot, as it relates to that evidence.

Fifth, Springfield CSD and Yontz request that the

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[13] Cresci's affidavit is Tab 5 of Doc. #79. The reports are Tabs 7-14 of that document.

[14] In their memorandum in opposition (Doc. #77) to the motion for summary judgment, the Plaintiffs do cite Cresci's affidavit; however, the evidence supplied by Cresci is simply not relevant to the issues raised by the motion for summary judgment and has not been considered by the Court in ruling thereon.

Court strike the various police interviews which the Plaintiffs have submitted.[15] These evidentiary materials are transcriptions of interviews of a number of Kaech's students, which were conducted by Officer Davidson and Sergeant Keys of the Springfield Police Department. In none of the interviews, does it appear that the person interviewed was under oath. The moving Defendants argue that the interviews must be stricken, because their unsworn nature makes them inadmissible hearsay. Plaintiffs argue that Davidson and Keys authenticated the interviews during their depositions. Plaintiffs miss the point. Although Rule 56(e) requires exhibits to be authenticated,[16] Springfield CSD and Yontz do not contend that the Court cannot consider the police reports because they have not been authenticated. Rather, these Defendants argue that reports are inadmissible hearsay. The Court agrees with the Defendants' argument. Simply stated, the reports are unsworn, out of court statements (whether authenticated or not) offered to prove the truth of the matters asserted therein, in other words, hearsay, and cannot be considered in ruling on the Defendants' motion for summary judgment.[17] See Rules 801(c) and 802.

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[15] The police interviews are Tab 6 to Doc. #79.

[16] Rule 56(a) provides in pertinent part, "[s]worn or certified copies of all papers shall be attached [to an affidavit] and served therewith." This provision in Rule 56(e) imposes two requirements. Exhibits must be authenticated by an affidavit, and an exhibit must be attached to an affidavit (i.e., an affiant cannot testify as to the contents of a document, without the document itself being provided). See 10A Wright, Miller & Kane, Federal Practice and Procedure, § 2722.

[17] The Plaintiffs do not argue that the reports may be considered under an exception to the hearsay rule, such as Rule 803(8). Such an

Therefore, the Court strikes the police reports and will not consider same when ruling on the motion for summary judgment.

Sixth, Springfield CSD and Yontz argue that the Court must strike the unsworn statements of Jane Roark ("Roark") and Yontz.[18] These two statements are narrations by Officer Davidson of statements he took from the two. Roark is the mother of one of Kaech's students. As such, her statement is inadmissible hearsay and will not be considered in ruling on the motion for summary judgment.[19] Yontz' statement stands on more solid footing. He is a party opponent; therefore, any out of court statement by him, sworn or unsworn, is not hearsay. See Rule 801(d)(2). Although, the statement is not properly authenticated with an affidavit, it was identified during Davidson's deposition and sufficiently qualified as a public record under Rule 803(8). Therefore, the Court will consider Yontz' statement in ruling on the motion for summary judgment.

Based upon the Court's reasoning for sustaining

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argument would not have been persuasive, because of a double hearsay problem with the reports. See Rule 805. The police reports are recorded statements of students of Kaech and their parents. There is simply no exception to the hearsay rule which would allow the Court to admit the statements of the students and their parents.

[18] The statements of Roark and Yontz are Tabs 16 and 17, respectively.

[19] Much of the information in Roark's statement has a non-hearsay purpose, proving that the Defendants had notice of abuse by Kaech. Therefore, if the statement had been sworn, it could have been considered for that non-hearsay purpose.

in part and overruling in part the motion to strike of Springfield CSD and Yontz, the Court has stricken and, as a result, will not consider the following evidentiary materials when ruling on the motion for summary judgment, to wit: 1) ¶¶ 6 and 7 of Hrinko's affidavit; 2) ¶ 8 of Attenweiler's affidavit; 3) Cresci's affidavit and reports; 4) the police reports; and 5) Roark's statement.

II. Motion of Springfield CSD and Yontz for summary judgment (Doc. #83)

In support of their motion for summary judgment,[20] Springfield CSD and Yontz raise a number of arguments, to wit: 1) they are entitled to summary judgment because the Plaintiffs have not demonstrated a constitutional right to be protected from allegedly improper or inappropriate teacher conduct; 2) Springfield CSD is entitled to summary judgment because the Plaintiffs cannot establish the existence of a policy, custom or practice which caused the alleged injuries; 3) Yontz is entitled to summary judgment because the Plaintiffs have failed to establish that he can be held liable, as a school principal, under a theory of supervisory liability; 4) they are entitled to summary judgment because there is no evidence that either of them acted intentionally, deliberately or with gross negligence toward the Plaintiffs; and 5) Yontz, as a principal of a Springfield

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[20] Springfield CSD's and Yontz' motion for summary judgment is directed at only three of the 14 counts in Plaintiffs' complaint, to wit: 1) Count XII (a § 1983 claim asserted against Yontz); 2) Count XIII (a § 1983 claim asserted against Springfield CSD; and 3) Count XIV (a count by which Plaintiffs seek to recover punitive damages from all defendants). In Counts I-XI, Plaintiffs do not seek to recover from Yontz and/or Springfield CSD.

City school, is entitled to summary judgment on the basis of qualified immunity. In addition, Springfield CSD and Yontz argue that, even if they are not entitled to summary judgment on the merits of Plaintiffs' § 1983 claims against them, they are entitled to summary judgment on Plaintiffs' demand for an award of punitive damages. As a means of analysis, the Court will set forth the standards which govern this, and every, motion for summary judgment. Then, it will turn to the moving Defendants' contentions, discussing them in the above order.

A. Standards governing motions for summary judgment

A motion for summary judgment "should be granted where the evidence is such that it 'would require a directed verdict [now a judgment as a matter of law] for the moving party.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 25 (1986), quoting *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624 (1944). Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Of course, the moving party:

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

477 U.S. at 323. See also *Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991). (The moving party has the "burden of showing that the pleadings, depositions,

answers to interrogatories, admissions and affidavits in the record, construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial." quoting *Gutierrez v. Lynch*, 826 F.2d 1534, 1536 [6th Cir. 1987]). The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250 (quoting Fed. R. Civ. P. 56(e)).

Once the burden of production has so shifted, the party opposing a summary judgment cannot reset on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 547, 586 (1986). See also, *Michigan Protection and Advocacy Service, Inc., v. Babin*, 18 F.3d 337, 341 (6th Cir. 1994) ("The plaintiff must present more than a scintilla of evidence in support of his position; the evidence must be such that a jury could reasonably find for the plaintiff."). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex Corp.*, 477 U.S. at 324. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Of course, in determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in the favor of that party. *Anderson*, 477 U.S. at 255 (emphasis added). In ruling on a motion for summary judgment (in other words, in determining whether there is a genuine issue of material fact), "[a]

district court is not . . . obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Interroyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), cert. denied, 494 U.S. 1091 (1990). See also, *L.S. Heath & Son, Inc. v. AT&T Information Systems, Inc.*, 9 F.3d 561 (7th Cir. 1993); *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915 n. 7 (5th Cir.), cert. denied, 113 S. Ct. 98 (1992) ("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment...."). Thus, a court is entitled to rely in determining whether a genuine issue of material fact exists on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file together with any affidavits submitted, specifically called to its attention by the parties.

B. Springfield CSD's and Yontz argument that they are entitled to summary judgment because the Plaintiffs have not demonstrated a constitutional right to be protected from allegedly improper or inappropriate teacher conduct.

Plaintiffs assert only claims under 42 U.S.C. § 1983 against Springfield CSD and Yontz. Section 1983 does not create substantive rights; rather, it establishes a remedy for a person who has been denied a federally created right by a person acting under color of state law. *Baker v. McCollan*, 443 U.S. 137 (1979). Consequently, § 1983 does not provide a remedy for alleged abuses of power which do not violate federal law. *Collins v. City of Harker Heights, Texas*, 112 S. Ct. 1061, 1065 (1992).

Applying these principles, Springfield CSD and Yontz argue that they are entitled to summary judgment

because the Plaintiffs have not demonstrated that the allegations in their complaint violated a federally created right, a constitutional right to be protected from allegedly improper or inappropriate teacher conduct. In support of this argument, these Defendants focus on cases in which courts have distinguished schools from prisons and mental hospitals and, based upon that distinction, concluded that school officials do not have an affirmative duty, under the Due Process Clause of the Fourteenth Amendment, to protect students from abuse. See e.g., *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992); *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364 (3d Cir. 1992) (en banc); *J.O. v. Alton Community Unit. Sch. Dist. 11*, 909 F.2d 267 (7th Cir. 1990); *Elliott v. New Miami Bd. of Ed.*, 799 F. Supp. 818 S.D. Ohio 1992). In reaching their conclusion that school administrators do not have an affirmative duty to protect students, these courts have applied the Supreme Court's holding in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) (holding that social workers were not liable, under § 1983, for failing to protect a minor from harm caused by his father). In *DeShaney*, the Supreme Court held that, in the absence of a special custodial relationship, persons acting under color of state law do not have an obligation, imposed by the Due Process Clause of the Fourteenth Amendment, to protect individuals from harm caused by private persons. Thus, in the above cited cases, the courts have concluded that there is not a special custodial relationship (such as that which exists between prison officials and inmates or officials at a mental hospital and patients) between school officials and students.

This Court does not quarrel with this line of cases. Simply stated, there is not a special custodial relationship between Springfield CSD and/or Yontz and the

Plaintiffs;[21] therefore, in accordance with the Supreme Court's decision in *DeShaney*, those Defendants did not have an obligation, arising under federal law, to protect the Plaintiffs from abuse by Kaech. Accordingly, these Defendants are entitled to summary judgment, to the extent that the Plaintiffs would impose liability upon them for their failure to protect the Plaintiffs from Kaech's alleged abuse.

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[21] Plaintiffs argue that a "special relationship" existed between themselves and the school district, because they were hearing impaired. See Doc. #77 at 26-27. Although the fact that the Plaintiffs are hearing impaired may distinguish them from students without such an impairment, that fact alone does not transform their relationship with the Defendants into a custodial one. In *Elliott*, Judge Spiegel concluded that the relationship students have with their schools did not resemble that which prisoners and patients have with prisons and mental hospitals, noting:

> While the state of Ohio has compelled [the plaintiff] to attend school, the state has not restricted her freedom or her parents' freedom to take action as it has with prisoners or patients of mental institutions. Students return home at the end of the school day, where they (or their parents) are free to act as any other person in our society. Prisoners and patients of mental institutions, on the other hand, do not have such rights. Furthermore, parents or guardians are the primary caretakers of students; whereas, the state is the primary caretaker of prisoners and patients of mental institutions. we recognize that the state certainly has a unique relationship with students of public schools; however, it is not the special relationship which the state has with prisoners and patients of mental institutions.

799 F. Supp. at 823. Herein, the Plaintiffs do not allege or present evidence that, unlike other students, they were not free to leave school at the end of each day or that they do not enjoy the same freedoms of other students.

However, this does not mean that these Defendants are entitled to summary judgment on Plaintiffs' § 1983 claim in their entirety. As Plaintiffs argue, they do not merely seek to impose liability upon these Defendants because they failed to protect the Plaintiffs from Kaech; rather, the Plaintiffs seek to impose liability upon them for Kaech's actions. Plaintiffs seek to impose liability on Springfield CSD under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), and its progeny, and they seek to impose liability upon Yontz under a theory of supervisory liability. Whether Defendants are entitled to summary judgment on either or both of these theories of liability is the subject of the next two sections of this Expanded Opinion. For present purposes, it is sufficient to recognize that courts have held that school districts and supervisory personnel can be held liable for the constitutional deprivations visited upon students by their teachers (in particular, for the denial of their liberty interest to bodily security and physical integrity). *Doe v. Taylor Independent School Dist.*, 15 F.3d 443 (5th Cir. 1994) (en banc); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990). Indeed, in *Maldonado*, *supra*, the Tenth Circuit, while concluding that school officials did not have a duty to protect students from harm, went to great length to distinguish *Stoneking*, 975 F.2d at 730-31.

C. Springfield CSD's contention that it is entitled to summary judgment because the Plaintiffs cannot establish the existence of a policy, custom or practice which caused the alleged injuries.

In *Monell*, *supra*, the Supreme Court held that § 1983 did not impose liability on a governmental subdivision for the constitutional torts of its employees

under a respondeat superior theory. Springfield CSD is such a governmental subdivision. Rather, the *Monell* Court concluded that a political subdivision can be liable, in a § 1983 action, for the constitutional torts committed by its employees only "when execution of a government's policy or custom, whether made by lawmakers or by those whose edicts or acts may fairly be said to represent official policy ...." 436 U.S. at 694. Of course, the policy or custom must cause, i.e., be the "moving force [behind] the constitutional violation." *Polk County v. Dodson*, 454 U.S. 312, 326 (1981). The Sixth Circuit has said that, in order for a plaintiff to establish that a governmental employer is liable under a *Monell* theory, he or she "must 'identify the policy, connect the policy to the [governmental entity] itself and show that the particular injury was incurred because of the execution of that policy.'" *Garner v. Memphis Police Dept.*, 8 F.3d 358, 364 (6th Cir. 1993) quoting *Coogan v. City of Wixom*, 820 F.2d 170, 176 (6th Cir. 1987).

Herein, Plaintiffs allege that Springfield CSD had "a widespread practice, custom or policy of reckless indifference to or concealment of instances of known or suspected physical or emotional abuse by Defendant Kaech. Administrative personnel, including Defendant Yontz, had knowledge of and/or acquiesced in this practice, custom or policy." Doc. #1 at ¶ 136.

Initially, Springfield CSD argues that it did not have such a policy.[22] Springfield CSD contends that,

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22 Springfield CSD and this Court use the word "policy" to mean a general statement which has been officially promulgated by the decision making body of the governmental entity, with the intention of controlling future conduct. *Monell*, 436 U.S. at 690. Thus, a "policy" must be distinguished from a "custom" or "practice" which

rather than having a policy which would allow employees to conceal or to acquiesce in instances of child abuse, it has had a policy, since 1981, which requires suspected incidents of abuse to be reported.[23] The plaintiffs have not produced any evidence of a contrary policy, either before the 1981 policy was adopted or thereafter. Some of the incidents of abuse for which Plaintiffs seek to recover damages may have occurred before the 1981 policy was adopted.[24] However, the Plaintiffs do not argue, much less present evidence tending to demonstrate, that Springfield CSD had a policy (something that was formally adopted) of tolerating abuse of students by teachers. Accordingly, the Court concludes that the question of whether Springfield CSD had a policy of tolerating Kaech's abuse of her students is not a genuine issue of material fact; Springfield CSD cannot be held liable under *Monell* on the basis that it had a policy which caused the alleged constitutional deprivations by Kaech.

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is unwritten and not formally adopted. *Id.*

23 A copy of that policy is Exhibit 4 to the affidavit of James Frantz, which is Exhibit B to the motion for summary judgment (Doc. #58).

24 Two of the Plaintiffs, Amy Adams and Joshua Kendall, allege that they were enrolled in Kaech's classes during the 1980-81 school year, before the policy was adopted. Doc. # at ¶¶ 11 and 13. However, Kaech taught them in years after the policy was adopted, and the Plaintiffs do not specifically allege in what year Kaech abused them. *Id.* Therefore, it is not certain that any of the alleged abuse for which recovery is sought in this litigation occurred before the policy was adopted in 1981. The other Plaintiffs were taught by Kaech long after the policy was adopted in 1981. The other Plaintiffs were taught by Kaech long after the policy was adopted. *Id.* at ¶¶ 12, 14-19.

Next, Springfield CSD argues that the Plaintiffs do not have sufficient evidence to establish that a custom or practice caused the alleged deprivation.[25] Springfield CSD argues that, to survive its motion for summary judgment, the Plaintiffs must present evidence which raises a genuine issue of material fact as to whether it had such a custom. Assuming that the existence of the custom is a genuine issue of material fact, Springfield CSD's argument continues, the Plaintiffs must also present evidence which raises a genuine issue of material fact as to whether it acted with deliberate indifference to the constitutional rights of the Plaintiffs when it established or perpetuated that custom. Plaintiffs, on the other hand, contend that evidence raising such genuine issues of material fact exists and that reckless indifference by Springfield CSD is a sufficient level of fault. Resolution of these questions requires a two-step analysis, to wit: 1) identification of the proper legal standard for fault (deliberate indifference or reckless indifference); and 2) an application of the correct legal standard to the evidence before the Court, i.e., to determine whether there are genuine issues of material fact as to whether Springfield CSD had a custom of acquiescence in and tolerance of abuse by Kaech and whether it acted with the appropriate level of fault in adopting or perpetuating that

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25 The Court, as does Springfield CSD, uses the word "custom" to mean something which, although it has not received formal approval from the governmental body's official decision making channels, is so pervasive that it could be regarded as permanent or well settled. *Monell*, 436 U.S. at 691 quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970). The parties use "custom" and "practice" interchangeably; however, this Court will primarily use the word "custom."

policy.[26]

First, the custom by which the Plaintiffs seek to impose § 1983 liability upon Springfield CSD is analogous to the custom which the Supreme Court recognized in *Canton v. Harris*, 489 U.S. 378 (1989); therefore, the degree of fault required to hold Springfield CSD liable should be same as that which the Supreme Court concluded was necessary to hold the city of Canton liable. The *Canton* Court recognized that a governmental entity could be liable, in a § 1983 action under *Monell*, for the constitutional torts of its employees when the asserted custom was a failure to train properly its employees. However, the *Canton* Court also said:

> We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.

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26 Springfield CSD also argues that the Plaintiffs have not properly alleged that a custom or practice caused the alleged deprivation. It contends that Plaintiff was required to allege that it acted with deliberate indifference rather than merely acting with reckless indifference, as Plaintiffs have alleged in their complaint. See Doc. #1 at ¶ 136. This case is before the Court on a motion for summary judgment (by which the evidence supporting the Plaintiffs' claims can be tested), rather than a motion to dismiss for failure to state a claim (by which the adequacy of Plaintiffs' complaint can be tested). Below, the Court concludes that deliberate indifference is the proper legal standard and that the question of whether Springfield CSD acted with deliberate indifference is a genuine issue of material fact; therefore, the Court will allow the Plaintiffs to amend their complaint to allege same.

Id. At 388 (emphasis added). See also *Pembaur v. Cincinnati*, 475 U.S. 469, 483-84 (1986) (plurality opinion of Brennan, "municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from various alternatives" by the city's policy makers); *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (plurality opinion of Rehnquist); *Deaton v. Montgomery County, Ohio*, 989 F.2d 885, 889-90 (6th Cir. 1993) (Montgomery County not liable under *Monell* for the constitutional deprivation allegedly committed by employees of the City of Dayton in the absence of proof that the county acted with deliberate indifference.). cf. *Doe v. Taylor*, 15 F.3d at 452-54 (supervisor of teacher who sexually assaults a student is liable only when he or she has acted with deliberate indifference). In *Canton*, the plaintiff sought to impose liability upon the city because of the latter's non-feasance, its failure to adequately train its employees. Similarly, herein, the Plaintiffs seek to impose liability on Springfield CSD for its non-feasance, its indifference to and acquiescence in the long standing pattern of abuse committed by Kaech. Therefore, to impose *Monell* liability upon Springfield CSD, for the constitutional torts allegedly committed by Kaech, Plaintiffs must prove that the school district was deliberately indifferent to the rights of the persons with whom Kaech was likely to come into contact, i.e., her students.

Second, construing the evidence before the Court in the manner most favorable to the Plaintiffs (the non-moving party), leads to the inescapable conclusion that the questions of whether Springfield CSD had a custom of acquiescence in and tolerance of a long-term pattern of abuse by Kaech, and whether it acted with deliberate indifference toward the rights of her students in establishing and perpetuating that custom are genuine

issues of material fact.[27] Complaints to officials of the school district regarding allegations of abuse by Kaech began as early as 1977, and continued thereafter. The response of the officials charged by the school district with resolving such complaints, the principals at Highlands,[28] was disbelief and disinterest. For instance, in her affidavit, Hrinko states that she saw and heard Kaech abuse a student[29] and that she reported the incident to Koerner, who was then the principal at Highlands. Doc. #79 at Tab 2, ¶ 5. Koerner's response was that he did not want to hear any complaints about teachers. *Id.* In April, 1980, Sprague told Koerner that Kaech had abused her daughter. *Id.* at Tab 3, ¶ 7. Koerner told her that he could not believe that one of his teachers would abuse a student. *Id.* During a meeting which Sprague, Koerner and Kaech attended, Sprague repeated her allegations of abuse against Kaech, and said that she was aware that other students had been abused by Kaech. *Id.* at ¶ 8. While repeating his earlier statement that he could not believe that one of his teachers could do the things Kaech was alleged to have done, Koerner begged Sprague not to file any claim arising out of the alleged incidents and promised to

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27 In the following recitation of facts, the Court construes the evidence before it in the manner most favorable to the Plaintiffs. Of course, the Court only considers the evidence which it has not previously stricken (i.e, the Court does not consider: 1) ¶¶ 6 and 7 of Hrinko's affidavit; 2) ¶ 8 of Attenweiler's affidavit; 3) Cresci's affidavit and reports; 4) the police reports; and 5) Roark's statement.

28 In their depositions, Robert H. Lehman and Thomas Looby, both of whom are former Superintendents of Springfield CSD, testified that complaints against teachers were resolved by their principals.

29 According to Hrinko, Kaech slapped a student so hard that it left a hand print on his jaw. Doc. #79 at Tab 2, ¶ 3.

monitor Sprague's daughter to assure that nothing further was done to her. *Id.*

This pattern continued after Yontz became principal at Highlands. For instance, Mary Fager ("Fager"), the grandmother of one of Kaech's students, met with Yontz after her grandson reported being injured by Kaech for the second time in the period of a few months. Yontz denied that any abuse had occurred, telling her that nothing had happened. According to Fager, Yontz refused to schedule a meeting between the two of them and Kaech. Similarly, Yontz has acknowledged that Jane Roark complained to him that Kaech had bruised her daughter Ginger's arm. Yontz spoke to Kaech, who denied bruising Ginger; thereafter, Yontz did nothing about the incident. In 1990, Shawn Wilson, the mother of one of Kaech's students, complained to Yontz of abuse visited upon her daughter Brandy by Kaech. Once again, Yontz refused to believe that one of his teachers would abuse one of her students. At some time between 1987 and 1989, Penny Sam complained to Yontz that Kaech had scratched her son Tommy Robinson with a pencil. Yontz asked Kaech about the allegation, which she denied; he did not ask Tommy Robinson about it. In 1991, Carol Armbrust ("Armbrust") complained to Yontz that Kaech had pushed her daughter Melinda out of her desk, injuring her knee. After Armbrust prepared a formal complaint, at Yontz' direction, the latter believed Kaech's denial.

In sum, there is evidence that numerous complaints of abuse by Kaech were made to the principals at Highlands (Koerner and Yontz), the very people to whom the school district assigned the responsibility of investigating complaints against teachers. In each instance, the complaint was ignored, or the

teacher's denial was believed. There is simply no evidence that any type of formal, or even informal, investigation was conducted. Indeed, the evidence is that no file of complaints regarding allegations of abuse was maintained. Given this evidence, the jury could find that Springfield CSD's acquiescence in and tolerance of abuse by Kaech was well settled; hence, it had a custom of such acquiescence and tolerance. Moreover, the jury could also find that Springfield CSD made a conscious decision to ignore the safety of its students, in other words, that the school district was deliberately indifferent toward their rights. Accordingly, the Court concludes that the question of whether Springfield CSD can be held liable under the custom prong of *Monell* is a genuine issue of material fact.[30]

Based upon the foregoing, the Court has ruled upon this branch of the motion for summary judgment (Doc. #58) in the following manner, to wit: 1) it has sustained that motion as it relates to Plaintiffs' assertion that a "policy" of Springfield CSD caused their constitutional deprivations; and 2) it has overruled same as it relates to Plaintiffs' allegation that "custom" or "practice" of Springfield CSD caused their constitutional deprivations. In addition, the Plaintiffs must file an amendment to their complaint, within seven (7) calendar days from date, alleging that Springfield CSD acted with deliberate indifference to the rights of the Plaintiffs in perpetuating the custom of acquiescing in and tolerance

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30 Springfield CSD also argues that there is no evidence that its alleged custom caused the constitutional deprivation. The Court does not agree. Certainly, a fair inference from the evidence is that, by tolerating the early incidents of abuse the school district caused Kaech to commit further such incidents.

of the pattern of abuse by Kaech.[31]

D. The argument that Yontz, as a principal of a Springfield City school, is entitled to summary judgment because the Plaintiffs have failed to establish that he can be held liable under a theory of supervisory liability.

Next, the moving Defendants argue that Yontz is entitled to summary judgment, because the Plaintiffs do not have sufficient evidence to hold him liable under a theory of supervisory liability. In *Doe v. Taylor*, *supra*, the Fifth Circuit addressed the question of the liability of a supervisory school official in a context similar to the present case:

> A supervisory school official can be held personally liable for a subordinate's violation of an elementary or secondary school student's constitutional right to bodily integrity in physical sexual abuse cases if the plaintiff establishes that:
>
> (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and
>
> (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and

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31 The Plaintiffs need not file an entire amended complaint; rather, they need only file a document, indicating which paragraphs of their complaint are amended and how those paragraphs are amended.

(3) such failure caused a constitutional injury to the student.

15 F.3d at 454. See also *Leach v. Shelby County Sheriff*, 891 F.2d 1241 (6th Cir. 1989); *Hays v. Jefferson*, 668 F.2d 869 (6th Cir.), cert. denied, 459 U.S. 833 (1982). Based upon, and without repeating, the evidence regarding Yontz, which is set forth above (in connection with Springfield CSD's argument that it cannot be held liable under *Monell*), the Court concludes that there is a genuine issue of material fact as to whether Yontz can be held liable under a supervisory liability theory. Construing the evidence in the manner most favorable to the Plaintiffs, Yontz knew of a pattern of abuse by Kaech; however, he demonstrated deliberate indifference to the constitutional rights of her students by failing to take the action which was necessary to stop it. Moreover, by acquiescing in such abuse, the jury could infer and, thus, conclude that he was the cause of the constitutional injuries suffered by Kaech's students.

Accordingly, the Court overrules the motion for summary judgment (Doc. #58), as it relates to the argument that Yontz cannot be held liable under a theory of supervisory liability.

E. The argument of Springfield CSD and Yontz that they are entitled to summary judgment because there is no evidence that either of them acted intentionally, deliberately or with gross negligence toward the Plaintiffs.

With this argument, Springfield CSD and Yontz argue that there is no evidence that either acted with the requisite level of fault, which they argue must have been, at a minimum, gross negligence. The Court need not tarry with this argument. In the preceding sections of

this Expanded Opinion, the Court has concluded that, for liability to attach, each of these Defendants must have acted with deliberate indifference and that there are genuine issues of material fact as to whether they acted with that level or degree of fault. Therefore, the Court overrules the motion for summary judgment (Doc. #58), to the extent that Springfield CSD and Yontz argue that there is no evidence that they acted with the requisite degree of fault.

F. The argument that Yontz is entitled to summary judgment on the basis of qualified immunity.

It is axiomatic that the affirmative defense of qualified immunity protects government officials, such as Yontz, from liability (and even from being required to stand trial or otherwise offer a defense), unless the right the official is alleged to have violated has been clearly established. *Anderson v. Creighton*, 483 U.S. 635 (1987). Herein, Yontz argues that the right of the Plaintiffs to be protected from abusive behavior by their teacher was not and has not been clearly established. The Court agrees with Yontz that the constitutional right of a student to be protected from the abusive conduct of his or her teacher was not, at the time of the events in question, and has not been, to date, clearly established. Indeed, the Court has concluded that there is not a special custodial relationship between school officials and students (see, *supra*, at 18-20), such that school officials would be required to protect students from abuse by teachers; therefore, such a right does not and cannot exist. Accordingly, Yontz is entitled to summary judgment, on the basis of qualified immunity, to the extent that the Plaintiffs' § 1983 claim against him is predicated upon their constitutional right to be protected from abusive behavior by their teacher. However, the Plaintiffs' claim

against Yontz is not merely that he failed to protect them from Kaech's alleged abuse. Rather, they also seek to impose supervisory liability upon Yontz for the alleged constitutional violations visited upon them by Kaech. Yontz does not argue that he is qualifiedly immune from the Plaintiffs' supervisory liability claim. Such an argument would be without merit, as it cannot be questioned that the potential liability of a supervisor for the constitutional torts of the employees he or she supervises has been clearly established by the Sixth Circuit. See e.g. *Hays v. Jefferson*, 668 F.2d 869 (6th Cir.), cert. denied, 459 U.S. 833 (1982).[32] Therefore, the doctrine of qualified immunity does not prevent the imposition of liability on Yontz under a supervisory liability theory. Accordingly, the Court sustains the motion for summary judgment (Doc. #58), as it relates to Yontz' argument that he is protected by the doctrine of qualified immunity, but only the extent that Plaintiffs would impose liability upon him under the theory that they had a constitutional right to be protected from abuse by their teacher.

G. Plaintiffs' entitlement to punitive damages.

Springfield CSD and Yontz argue that even if they are potentially liable to the Plaintiffs, they are entitled to summary judgment on the Plaintiffs' claim for punitive damages. Without question, Springfield CSD is entitled

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32 Some of the incidents of abuse may have occurred before January 4, 1982, when the Sixth Circuit announced its decision in *Hays*. See Footnote 24, supra. However, the *Hays* court applied the well settled principle that a supervisor could be held liable for the constitutional torts of the employees he or she supervised. The precise issue decided by the Sixth Circuit in *Hays* was that the supervisor's culpability had to be greater than a simple negligence.

to summary judgment on the Plaintiffs' request for an award of punitive damages against it. The Supreme Court has held that, in a § 1983 action, punitive damages cannot be awarded against a governmental entity. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) As to Yontz, the Court disagrees with the moving Defendants. The Supreme Court has said that punitive damages are appropriate in a § 1983 action "when the defendant's conduct is motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). In *Hill v. Marshall*, 962 F.2d 1209 (6th Cir. 1992), the Sixth Circuit applied the test set forth in *Smith* and Concluded that "the state of mind that meets the standard of deliberate indifference is sufficient to meet the standard for punitive damages." *Id.* at 1217. Herein, this Court has concluded that there is a genuine issue of material fact as to whether Yontz acted with deliberate indifference to the constitutional rights of the Plaintiffs.[33] Accordingly, the Court similarly concludes that there is a genuine issue of material fact as to whether the Plaintiffs are entitled to an award of punitive damages against Yontz. Accordingly, the Court sustains the motion for summary judgment (Doc. #58), to the extent that Springfield CSD seeks summary judgment on Plaintiffs' request for an award of punitive damages against it, and overrules that motion to the extent that Yontz seeks summary judgment on Plaintiffs' request for an award of

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33 Of course, the only constitutional right of the Plaintiffs implicated by this litigation is a substantive due process right, a liberty interest to bodily security and physical integrity. While much of the Plaintiffs' constitutional claim against Yontz survives this ruling on the motion for summary judgment, the Court has concluded that the Plaintiffs did not have the right to be protected from abusive conduct by their teacher.

punitive damages against him.

Based upon the foregoing, the Court has sustained in part and overruled in part the motion for summary judgment of Springfield CSD and Yontz (Doc. #58). The Court has sustained that motion with respect to the moving Defendants' argument that they are entitled to summary judgment on Plaintiffs' § 1983 claim to the extent that same is predicated upon a constitutional obligation to protect them from Kaech's alleged abuse. The Court has also sustained that motion with respect to Springfield CSD's arguments that it is entitled to summary judgment to the extent that Plaintiffs' *Monell* claim is predicated upon a "policy" (i.e., a formally adopted policy), and that it is entitled to summary judgment on Plaintiffs' request for an award of punitive damages against it. Otherwise, the Court has overruled said motion. Based upon these rulings, all of Plaintiffs claims remain for trial. However, the Plaintiffs' claims (with regard to Counts XII-XIV) have been limited somewhat by the Court's ruling on the motion for summary judgment. First, the Plaintiffs' § 1983 claims against Springfield CSD and Yontz cannot proceed under a theory that Plaintiffs had a constitutional right to be protected from abuse by Kaech. Rather, with these claims, Plaintiffs can proceed only under a *Monell* theory (against Springfield CSD) and a supervisory liability theory (against Yontz). Second, the Plaintiffs can proceed against Springfield CSD only under the "custom" or "practice" prong of *Monell* and not under its "policy" prong. Third, the Plaintiffs cannot recover punitive damages from Springfield CSD.

/s/
WALTER HERBERT RICE
UNITED STATES
DISTRICT JUDGE

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

AMY D. ADAMS, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. C-3-92-157
	)	
BEVERLY KAECH, et al.	)	
	)	JUDGE WALTER
Defendants.	)	HERBERT RICE

DECISION AND ENTRY REJECTING YONTZ' ARGUMENT THAT HE IS ENTITLED TO SUMMARY JUDGMENT UNDER NEWLY ASSERTED THEORY OF QUALIFIED IMMUNITY; DEFENDANT YONTZ DIRECTED TO FILE NEW NOTICE OF APPEAL; DECISION AND ENTRY SUSTAINING PLAINTIFFS' MOTION TO CERTIFY APPEAL AS FRIVOLOUS (DOC. # 169); DECISION AND ENTRY OVERRULING YONTZ' MOTION TO STAY TRIAL (DOC. #170); LIMITED STAY ORDERED.

This case arises out of allegations that Defendant

Beverly Kaech ("Kaech") mistreated some of the students she taught at Highlands Elementary School ("Highlands"). Highlands is located in Springfield, Clark County, Ohio, and is operated by Defendant Springfield City School District ("Springfield CSD"). Kaech taught children with hearing disabilities, who were in grades three, four and five. On April 10, 1992, the Plaintiffs[1] initiated this action, in which they allege that Kaech physically and emotionally abused them. Plaintiffs assert claims under federal and state law against Kaech, Springfield CSD and Richard Yontz ("Yontz"), who was the principal at Highlands.

On July 12, 1994, this Court entered its expanded opinion (Doc. #160), setting forth its reasoning for sustaining in part and overruling in part the motion for summary judgment (Doc. #58) filed by Yontz and Springfield CSD. In that motion, Yontz had argued, inter alia, that he was entitled to summary judgment on the basis of qualified immunity, because the Plaintiffs had failed to demonstrate that they had a constitutional right to be protected from allegedly inappropriate teacher conduct which was clearly established at the time of the conduct in question.[2] In ruling on that branch of the

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1 The Plaintiffs are Kaech's former students or parents of such students.

2 In his motion for summary judgment, Yontz said:

> Counsel knows of no cases in the Supreme Court, Sixth Circuit, or otherwise, which have held that the type of conduct which forms the basis of plaintiffs' complaint violates a "clearly established" constitutional right. Quite simply, as previously discussed in this memorandum, plaintiffs have failed to demonstrate a constitutional right to be protected

motion for summary judgment, the Court agreed with Yontz, concluding that such right was not clearly established. Indeed, the Court concluded that the right to be protected from allegedly inappropriate teacher misconduct did not exist. However, the Court noted that Plaintiffs sought to recover from Yontz under an alternative theory, to wit: that Yontz was liable for the Kaech's constitutional torts under a supervisory liability theory. In closing its discussion of the qualified immunity argument, the Court noted, in dicta, that, although Yontz had not argued that supervisory liability was not clearly established at the time in question, it was indeed so established.[3] However, before making that comment, the Court did not engage in the analysis which the Supreme Court required in *Anderson v. Creighton*, 483 U.S. 635 (1987). In other words, the Court did not determine whether supervisory liability had been established in the

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from allegedly inappropriate teacher conduct.

Doc. #58 at 28 (emphasis added). In the previous discussion referred to by Yontz, he had relied upon *DeShaney v. Winnebago County*, 489 U.S. 189 (1989) and its progeny in arguing that he could not be held liable for failing to protect Plaintiffs' from Kaech's conduct (i.e., the Plaintiffs did not have a constitutional right to such protection). Thus, the Court construed Yontz' qualified immunity argument to be that, even if the Plaintiffs had a constitutional right to such protection, the right was not clearly established when Kaech's allegedly inappropriate conduct occurred. Parenthetically, Kaech's name does not appear in Yontz' discussion of qualified immunity.

s In his motion to stay (Doc. #170), Yontz argues that Plaintiffs did not assert a supervisory liability claim against him. The Court does not agree. Count XII of the Plaintiffs' complaint (Doc. #1) sets forth such a supervisory liability claim against Yontz. Indeed, in the motion for summary judgment, Yontz had argued that there was not sufficient evidence to hold him liable under a supervisory liability theory. See Doc. #58 at 21-24.

particularized sense with the pertinent facts of this case in mind.

On July 19, 1994, Yontz filed a notice of appeal, appealing this Court's decision on that part of the qualified immunity finding which had denied the motion for summary judgment on Plaintiffs' supervisory liability theory. See Doc. #167. On that same day, Plaintiffs filed a motion requesting that the Court certify Yontz' appeal as frivolous. See Doc. #169. Two days later, on July 21, 1994, Yontz filed a motion seeking to have the Court stay further discovery and the trial of this litigation.[4] See Doc. #170. Seemingly, Yontz would have little to appeal (save the denial of qualified immunity on the supervisory liability issue), as the Court agreed with him that he was entitled to qualified immunity on Plaintiffs' claim that he violated their constitutional rights by failing to protect them from Kaech's alleged abuse. However, during the conference call between the Court and counsel, conducted on July 21, 1994 (and in his motion to stay), Yontz explained that his qualified immunity argument had an additional element, to wit: the initial threshold issue of whether Kaech's alleged conduct violated the Plaintiffs' constitutional rights which were clearly established at the time of the alleged conduct. Yontz would, of course, have the Court answer this question in the negative. Despite the fact that the Court continues to believe that Yontz did not rely upon the newly asserted theory of qualified immunity in the motion for summary judgment (and thus waived same for purposes of such a motion), the Court, herein in the interest of completeness, will address same, and, in addition, will

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4 The trial of this litigation is now scheduled to begin on July 26, 1994.

rule on the Plaintiffs' motion to certify the appeal as frivolous (Doc. #169) as well as Yontz' motion to stay (Doc. #170).

The Plaintiffs claim that Kaech violated their substantive due process right (under the Fourteenth Amendment) to bodily security. To determine whether Yontz is entitled to qualified immunity from this claim, the Court must first examine the contours of that right. In *Hall v. Tawney*,, 621 F.2d 607 (1980), the Fourth Circuit recognized that students have a substantive due process right to be free from certain invasions of their bodily security, by school officials, writing:

> In the context of disciplinary corporal punishment in the public schools, we emphasize once more that the substantive due process claim is quite different than a claim of assault and battery under state tort law. In resolving a state tort claim, the decision may well turn on whether "ten licks rather than five" were excessive ... so that line-drawing this refined may be required. But substantive due process is concerned with violations of personal rights of privacy and bodily security of so different an order of magnitude that inquiry in a particular case simply need not start at the level of concern these distinctions imply. As in the cognata police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.

> See *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (Friendly, J.). Not every violation of state tort and criminal assault laws will be a violation of this constitutional right, but some of course may.

Id. at 613. In *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987), the Sixth Circuit quoted extensively from and applied *Hall*. The Fifth Circuit has recognized the same right, although with a slightly different formulation of the test used to determine whether the right has been violated. "Corporal punishment is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." *Woodard v. Los Fresnos Independent School Dist.*, 723 F.2d 1243, 1246 (5th Cir. 1984). *Accord Ingraham v. Wright*, 525 F.2d 909, 916 (5th Cir. 1976) (en banc), affirmed on other grounds, 430 U.S. 651 (1977).[5] Indeed, in 1974, Judge Rubin, of this Court, recognized such a substantive due process right in the corporal punishment setting and formulated the test in the same manner as the Fifth Circuit.[6] *Sims v. Waln*, 388 F.Supp. 543, 549 (S.D. Ohio 1974). Interestingly, *Sims* involved a challenge to the corporal punishment policy of the Springfield CSD.

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5 In *Ingraham*, the Supreme Court did not address the question of whether a student has a substantive due process right to be free from certain types of abuse. Indeed, that Court denied review of the third question in the petition for certiorari, which raised that question. 430 U.S. at 659 n. 12.

6 Whether the Court instructs the jury using the formulation of the test adopted by the Fourth Circuit (approved by the Sixth) or that adopted by the Fifth Circuit and Judge Rubin is an issue on which the Court will decide at trial.

Of course, merely because a right exists does not mean that it has been "clearly established," a question which is the touchstone of the qualified immunity defense. The Sixth Circuit has said that to determine whether a right is clearly established, the district court must examine "the decisions of the Supreme Court and the courts of this circuit." *Poe v. Hayden*, 853 F.2d 418, 424 (6th Cir. 1988). See also *Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993) ("'[A] district court must find binding precedent by the Supreme Court, its court of appeals or itself.'" quoting *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988)). To find that the substantive due process right upon which the Plaintiffs rely was clearly established when Kaech engaged in the conduct in question, this Court need look no further than Judge Rubin's decision in *Sims*. Simply stated, in 1974, in a case involving the very school district which is a Defendant herein, Judge Rubin held that students have a substantive due process right to free from corporal punishment which is arbitrary, capricious or wholly unrelated to legitimate state goals, such as maintaining an atmosphere conducive to learning. 388 F. Supp. at 549. Therefore, the right upon which the Plaintiffs rely was clearly established in 1982, the year in which the first incidents of abuse, for which the Plaintiffs seek to recover, are alleged to have occurred.

The final step in the qualified immunity analysis requires this Court to decide whether there is a genuine issue of material fact as to whether Kaech violated that clearly established right. This Court is compelled to conclude that said question raises a genuine issue of material fact. It is axiomatic that the party seeking summary judgment bears the initial burden of demonstrating his or her entitlement to same. *Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991) (The

moving party has the "'burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial.'" quoting *Gutierrez v. Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987)). In the motion for summary judgment, Yontz did not cite any evidence which would demonstrate that Kaech did not violate the Plaintiffs' clearly established substantive due process right. Moreover, "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment...." *Skotak v. Tennaco Resins, Inc.*, 953 F.2d 909, 915 n. 7 (5th Cir.), cert. denied, 113 S.Ct. 98 (1992). See also *Interroyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), cert. denied, 494 U.S. 1091 (1990); *L.S. Heath & Son, Inc. V. AT&T Information Systems, Inc.*, 9 F.3d 561 (7th Cir. 1993). Thus, a court is entitled to rely, in determining whether a genuine issue of material fact exists (or does not exist) on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file together with any affidavits submitted, specifically called to its attention by the parties. Herein, approximately 160 depositions have been filed; this Court is simply not required to read all of those depositions in an effort to determine whether the evidence demonstrated the absence of a genuine issue of material fact. Nevertheless, the Court has reviewed the depositions of the nine former students of Kaech who are Plaintiffs (or the children of Plaintiffs). Based upon the review, the Court cannot conclude that there is not a genuine issue of material fact on the issue of whether Kaech violated the substantive due process rights of her former students (the Plaintiffs or children of Plaintiffs). The depositions are inconclusive as to what Kaech did to her students and the

circumstances under which those actions occurred. Where the depositions are inconclusive, they must be construed in the light most favorable to the Plaintiffs, who are the non-moving parties. So construing them, there certainly exist genuine issues of material fact as to what, if anything, happened in Kaech's classroom. Where the facts of the case cannot be determined before trial, qualified immunity is unavailable. *Brandenburg v. Cureton*, 882 F.2d 211, 215-16 (6th Cir. 1989). Indeed, in some of their depositions, the former students were not even questioned (or extensively questioned) about the abuse allegedly visited upon them by Kaech. While the absence of such evidence at trial will be fatal to these Plaintiffs, on a motion for summary judgment, it is fatal to Yontz, the moving party, upon whom the burden of initially demonstrating the absence of a genuine issue of material fact rests.[7]

Based upon the foregoing, the Court concludes that Yontz is not entitled to summary judgment under his newly formulated theory of qualified immunity.

Yontz has filed a notice of appeal of this Court's ruling on his motion for summary judgment based upon qualified immunity. As a general rule, immediate appeal

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7 To the extent that Yontz supports his new theory with the Plaintiffs' complaint, rather than with properly submitted Fed. R. Civ. P. Rule 56 evidence (in other words, in essence, seeking dismissal of the complaint rather than summary judgment on the claim asserted against him therein), the Court cannot agree. The complaint is filed with unauthenticated and unverified allegations which, if proved, would allow a jury to find that Kaech violated the Plaintiffs' substantive due process right by committing violent acts against them which were wholly unrelated to the need to maintain a learning environment.

may be taken from a district court's decision to deny qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Such immediate appeal requires a stay of the proceedings against the party seeking immunity, pending the resolution of the appeal. *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986). However, under some circumstances, a district court may make "findings of frivolousness or waiver" with regard to the appeal, and proceedings against the party whose claim of immunity has been denied may continue in the trial court. *Yates v. City of Cleveland*, 941 F.2d 444, 448-449 (6th Cir. 1991).[8] The Plaintiffs have filed a motion seeking to have this Court certify Yontz' notice of appeal as frivolous. See Doc. #169.

Thus, this Court is faced with two options. Either Defendant's trial, scheduled to begin in a matter of days, is to be stayed pending the resolution of this appeal, or the appeal is to be certified as frivolous, the notice of appeal is to be stricken, and trial will proceed. The Court would first point out that a finding of waiver or untimeliness would be inappropriate in this matter. The Court did not file its final, expanded opinion on the motion for summary judgment, until approximately two weeks before trial was scheduled to begin. That the notice of appeal was filed so shortly before the beginning of trial is not the result of any unreasonably dilatory tactic

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8 Defendant argues that the *Yates* court "did not specifically hold that a district court may terminate an appeal solely on the grounds of 'frivolousness.'" Memorandum of Defendant Yontz in Opposition to Plaintiffs' Motion for Certification of Appeal as Frivolous at 2-3 (quoting *Yates*). This Court reads the Court of Appeals' use of the disjunctive "or" as permitting a court to make a finding either of frivolousness or of waiver in deciding to proceed to trial in the face of a notice of appeal of a denial of qualified immunity.

on the part of Yontz.

The question is whether this appeal is frivolous. Judge Wiseman of the Middle District of Tennessee recently had occasion to discuss the standard to be used in making such a determination. *Dickerson v. McClellan*, 844 F. Supp. 391, 394-95 (M.D. Tenn. 1994). After determining that the law is fairly clear that a district court does have the ability to certify an appeal as frivolous, Judge Wiseman prefaced his discussion of the standard to be used by noting that there has been little guidance on this standard from the Sixth Circuit Court of Appeals, or from any other Courts of Appeals, for that matter. *Id.* at 394.

Judge Wiseman particularly noted that the Sixth Circuit has stated that summary judgment on qualified immunity grounds cannot be granted if there are genuine issues of material fact "'"involving an issue on which the question of immunity turns, such that it cannot be determined before trial whether the defendant did acts that violate clearly established rights."'" *Id.* at 394 (quoting *Rich v. City of Mayfield Heights*, 955 F.2d 1092, 1095 (6th Cir. 1992) (quoting, in turn, *Poe v. Haydon*, 853 F.2d 418, 426 (6th Cir. 1988))). Judge Wiseman concluded, in *Dickerson*, that such factual disputes were so clearly evident that they would necessarily prevent the Court of Appeals from being able to find qualified immunity appropriate; accordingly, the appeal was baseless. *Id.* at 395-97. On that basis, Judge Wiseman certified the appeal in that case as frivolous, dismissed the notice of appeal, and proceeded with the trial. *Id.*

While it is true that a district court should certify an appeal as frivolous only in the rarest of circumstances, see *McMath v. City of Gary, Indiana*, 976 F.2d 1026, 1030-

31 (7th Cir. 1992), this Court finds itself compelled to do so in this instance, due to the immediately apparent groundlessness of the appeal.

The branch of the motion for summary judgment, raising the affirmative defense of qualified immunity, contained absolutely no factual development. As explained above, the legal standard to be applied in corporal punishment cases has long been clearly established in this District. The question is whether the actions complained of run afoul of that standard. As the movant for summary judgment, it was incumbent upon Yontz to identify the particular actions that form the basis of these Plaintiffs' complaint and, then, to demonstrate that those actions could not violate constitutional rights as a matter of law. Yontz has failed to do so.

In his memorandum in response to the motion to certify the notice of appeal as frivolous, Yontz argues that it is the Plaintiffs who have failed "to come forward with specific facts demonstrating that [he] was not entitled to qualified immunity as required by *Rich v. City of Mayfield Heights*, 955 F.2d 1092 (6th Cir. 1992)[.]" Memorandum of Defendant Yontz is Opposition to Plaintiffs' Motion for Certification of Appeal as Frivolous at 3-4. Yontz misreads *Rich*, which states in no uncertain terms that: "Defendants bear the initial burden of coming forward with facts to suggest that they were acting within the scope of their discretionary authority during the incident in question." *Rich*, 955 F.2d at 1095 (emphasis added). A defendant may not merely assert, "I am a public official and deserve qualified immunity," and, by doing so, shift the burden to the plaintiff to set forth facts. A defendant seeking qualified immunity must be required to proceed in one of two ways: either he or she argues that the face of the complaint does not allege facts sufficient to

overcome qualified immunity, and, thus, that the defendant is entitled to judgment on the pleadings, or he or she presents Rule 56 evidence, on a motion for summary judgment, demonstrating that the incidents in question did not involve conduct that violated clearly established constitutional rights. The complaint in this action certainly sets forth allegations that may be construed to describe incidents in which constitutional rights were violated. Accordingly, it was incumbent upon Yontz to set forth some evidence that what actually occurred was not egregious enough to trigger constitutional liability. Never having set forth the facts of any of the alleged incidents for the purposes of his motion seeking qualified immunity (and thus not having pointed out, as he must, the absence of a genuine issue of material fact), Yontz is not permitted to shift the burden onto the Plaintiffs.[9]

This matter presently stands in a factual vacuum. The Court of Appeals would be unable to find Yontz qualifiedly immune for the same reason that this Court cannot do so -- there simply is not enough information as to what Kaech did or did not do to the children in her classes. Analysis of her actions and the circumstances under which those actions were taken, and the determination whether those actions went beyond the constitutionally permissible level of corporal punishment, must be left to the trier of fact. Yontz has made absolutely no demonstration why, for example, a finder

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9 On a more basic level, it is the opinion of the Court that Yontz did not even articulate in his motion seeking qualified immunity any argument in favor of qualified immunity to the Plaintiffs' supervisory liability claim, and it would, therefore, be inherently unfair to place a burden of production on the Plaintiffs to support a response to an argument that was not even made in the first place.

of fact could not reasonably conclude that Kaech slammed her pupils' faces into their desks in a constitutionally impermissible manner, as opposed to concluding that Kaech did not so impact upon the children's faces and, in fact, did nothing more than grab her students' arms in order to get their attention when they were misbehaving. A court cannot "make a determination [as to qualified immunity] if the exact character of the 'actions' that *Anderson* [*v. Creighton*, 483 U.S. 635 (1987),] requires the court to consider is unknown." *Brandenburg*, 882 F.2d at 215 (6th Cir. 1989) (citing *Poe v. Haydon*, 853 F.2d 418, 426 (6th Cir. 1988)).

Yontz can no more ask the Court of Appeals to scour the approximately 160 depositions filed in this matter than it can ask this Court to do so. Because Yontz has completely failed to develop (a better word might be "narrow"), for the purposes of seeking qualified immunity, the facts surrounding the alleged abuse of the children, the Court of Appeals would have no more basis to grant qualified immunity than did this Court. Accordingly, this Court finds that the Defendant's notice of appeal is completely baseless, and does certify it as frivolous.

Based upon the foregoing, the Court sustains Plaintiffs' motion to certify the appeal as frivolous (Doc. #169) and strikes the previously filed notice of appeal. Furthermore, the Court would state that any notice of appeal taken from the rulings announced in this decision would also be frivolous, for the same reasons as stated above, and would strike any such notice of appeal, as well. Along with his notice of appeal, Yontz has also moved to stay these proceedings. See Doc. #170. For the reasons expressed above, the Court overrules Yontz' motion to stay (Doc. #170).

Trial upon the merits will, therefore, proceed. However, in the interest of justice and conservation of judicial resources, the Court will stay proceedings until 9:00 A.M. on Wednesday, July 27, 1994, in order to allow Yontz the opportunity to request a stay of these proceedings from the Sixth Circuit. By this action, the Court does not intend in any way to retract its determination that the appeal of this or the prior qualified immunity ruling is frivolous, or its ruling that a stay of these proceedings would be inappropriate.

/s/
WALTER HERBERT RICE
UNITED STATES DISTRICT
JUDGE

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